benchmarks of quality consumers can expect from each provider." (A38; Order Resolving Arbitration Issues at 23). Therefore, it is clear that the MPUC acted pursuant to state law.

Given the MPUC's reliance on state law, the question then becomes, does Minnesota law provide the necessary authority for the MPUC to require the provision of superior quality service? Minnesota law states that the MPUC has the power to investigate services and issue orders respecting services that it finds to be inadequate. Minn. Stat. § 237.081. It also has the power to "establish terms and conditions for the entry of telephone service providers . . . ," Minn. Stat. § 237.16, subd. 1(2), and to adopt any requirements, above those required by federal law, found to be necessary "to ensure the provision of high quality telephone services throughout the state." Minn. Stat. § 237.16, subd. 8. Based on its authority to issue orders concerning inadequate services, establish the terms for entry of new telephone service providers, and to ensure high quality telephone service, the MPUC has the necessary authority under state law to require US West to offer superior quality interconnection, if deemed necessary, as well as to require the parties to add a penalty provision to the Agreement in order to ensure compliance.[4] Given the requisite authority under state law, the MPUC may compel the parties to adopt the provision at issue under § 252(e)(3).

Furthermore, contrary to US West's allegations, the MPUC did not act in an arbitrary or capricious manner when it required US West to meet a quality standard. With its extensive experience with telephone services in general, as well as any doubts it may have had concerning the past quality of US West's service, the MPUC had the necessary predicate to require US West

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[4]This Court's order in the companion case US West v. MPUC, Civ. No. 97-913 ADM/AJB, more fully addresses the permissibility of a penalty provision.

to provide superior service, if necessary, with the understanding that the CLEC would pay for the superior service.[5]

US West also argues that the MPUC erroneously failed to follow formal rulemaking procedures in implementing these rules. The Minnesota Supreme Court has ruled "[a]dministrative policy may be formulated by promulgating rules or on a case-by-case determination. An agency has discretion to decide what method is appropriate in a particular situation." Bunge Corp. v. Commissioner of Revenue, 305 N.W.2d 779, 785 (Minn. 1981) (citing Securities & Exchange Commission v. Chenery, 332 U.S. 194, 203 (1947); American Power & Light Co. v. Securities & Exchange Commission, 329 U.S. 90, 106 (1946)). In this case, the MPUC did not abuse its discretion by taking the case-by-case approach. The MPUC appropriately elected an adjudicatory approach because the specific facts of the case and the particular Agreement between the parties should control. See In the Matter of the Proposal by Lakedale Telephone Co. to Offer Three Additional Class Services, 561 N.W.2d 550, 555 (Minn. Ct. App. 1997). Moreover, the procedure followed by the MPUC is dictated by the federal act.

III. RESALE REQUIREMENT

US West alleges that the MPUC's decision to require a contract provision permitting Sprint to resell US West's business services, including Centron,[6] to residential customers and

[5] Although it does not effect the ruling, US West has also failed to show that the services it will ultimately provide Sprint are actually superior to those that it provides itself.

[6] Centron is a tariffed service sold by US West to medium to large businesses and governmental entities. It essentially "dedicates" electronic switching functions performed at a central office switch to the customer, in place of an on-site switch at the customer's site. It includes such switching features as voice mail, caller ID, call hold, call transfer, and three-way calling.

subject to only limited restrictions is arbitrary and capricious. US West claims that the evidence before the MPUC supported a different result.

The MPUC and Sprint argue that US West failed to rebut the presumption that a restriction on resale of business services to residential customers is unreasonable. They claim that the MPUC was following the mandates of the Act and the FCC Rules in finding US West's proposed restrictions unreasonable.

The Act imposes on incumbent LECs the duty "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers . . . ." 47 U.S.C. § 251(c)(4)(A). The Act also states that incumbent LECs cannot impose unreasonable limitations on the resale of telecommunications services, except that a state commission may, consistent with FCC regulations, limit resale to the same category of subscribers to which the incumbent LEC provides the service. 47 U.S.C. § 251(c)(4)(B).

The FCC determined that "resale restrictions are presumptively unreasonable. Incumbent LECs can rebut this presumption, but only if the restrictions are narrowly tailored." First Report and Order, ¶ 939. The FCC explained the rationale behind its decision:

> In a competitive market, an individual seller (an incumbent LEC) would not be able to impose significant restrictions and conditions on buyers because such buyers turn to other sellers. Recognizing that incumbent LECs possess market power, Congress prohibited unreasonable restrictions and conditions on resale. . . . Given the probability that restrictions and conditions may have anticompetitive results, we conclude that it is consistent with the procompetitive goals of the 1996 Act to presume resale restrictions and conditions to be unreasonable and therefore in violation of section 251(c)(4).

Id. The FCC went on to discuss cross-class resale restrictions. Id. With regard to the resale of residential services to nonresidential end users, the FCC determined that section 251(c)(4)(B) permits state commissions to prohibit such resale. Id., ¶ 962. The other restriction involving cross-class resale of services that the FCC found permissible under 251(c)(4)(B) involved means-tested services. Id. The FCC stated that "all other cross-class selling restrictions should be presumed unreasonable. Without clear statutory direction concerning potentially allowable cross-class restrictions, we are not inclined to allow the imposition of restrictions that could fetter the emergence of competition." Id. ¶ 963. However, incumbent LECs can "rebut this presumption by proving to the state commission that the class restriction is reasonable and nondiscriminatory." Id.

The MPUC made explicit findings that US West failed to rebut the presumption that restrictions on Sprint's resale of business services to residential customers would be unreasonable and discriminatory. (A20, Order Resolving Arbitration Issues at 16). The MPUC considered the evidence on the record, the majority of which concerned Centron, e.g. the testimony of Beth Ann Halvorson, US West's Regional Executive Director for Public Policy, and the testimony of Kendal Ross, Director of Local Market Integration for Sprint. Sprint asserted to the MPUC that the resale restrictions sought by US West would require Sprint to conform and limit its marketing plan concerning the mix of services sold to customers to that designed by US West. (A12; ALJ Hearing at 13 (Testimony of Kendal Ross)). Sprint alleged these resale restrictions would limit its ability to create customer products. (A12; ALJ Hearing at 13 (Testimony of Kendal Ross)). US West argued to the MPUC that unrestricted resale of Centron would require US West to implement a complex system of changes and US West would lose the ability to charge for certain features used by the individual residential customers, e.g. switched access and toll charges. (A12; ALJ Hearing at 67, 97 (Testimony of Beth Ann Halvorson)). The

MPUC explicitly rejected US West's contention that unrestricted resale of Centron would unfairly require it to implement a complex system of changes; the MPUC noted that systems changes are a necessary outgrowth of the opening of local competition. (A38; Order Resolving Arbitration Issues at 17). The MPUC was also unpersuaded by US West's allegation that it would lose revenue if Centron was made available to residential customers. (A38; Order Resolving Arbitration Issues at 17). The MPUC reasoned that competition in the local market will inevitably cause some revenue shifts. (A38; Order Resolving Arbitration Issues at 17).

The MPUC gave due consideration to the issues raised by the parties and addressed those issues in its order. There was sufficient evidence before the MPUC, in addition to its expertise concerning the operation of utility services, to conclude that US West had failed to rebut the presumption about cross-class restriction. Therefore, the MPUC's decision was not arbitrary and capricious.

IV. COST RECOVERY FROM INTERIM NUMBER PORTABILITY

The Act directs that local exchange carriers have "a duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by" the FCC. 47 U.S.C. § 251(b)(2). This means that US West is required to allow its customers to retain their local telephone numbers when they switch to another local telephone service provider. Until permanent number portability is in place, US West and Sprint agreed to provide each other with interim number portability via remote call forwarding ("RCF") or direct inward dialing ("DID"). (A45; Negotiated/Arbitrated Terms of Agreement for Interconnection, Resale, and Unbundled Elements at 76, § 9.1.2). Under remote call forwarding, a call to a Sprint customer, who is a former US West customer, is routed through US West's central office switch that originally served that customer and then switched to the Sprint switch to which the number has been forwarded. (A16; Direct Testimony of Beth Ann Halvorson at 179-80). In effect, each terminating call is two separate calls. (A16; Direct Testimony of Beth Ann Halvorson at 180).

US West claims that the MPUC erred when it imposed Sprint's proposed agreement provision for the division of access charges. The imposed provision provides:

> For Sprint facilities-based services and services built with cost-based, unbundled elements, Sprint is entitled to both originating and terminating access charges associated with calls terminating to ported numbers assigned to Sprint subscribers. U S WEST retains access charges when Sprint service is provided by a rebranded wholesale U S WEST service. In addition, pursuant to 47 CFR § 51.515 where U S WEST switching is used prior to June 30, 1997, CCL and 75 percent of TIC charge will be paid by Sprint to U S WEST. These will be billed to IXCS on a multi-tariff/multi-bill basis.

(A45; Negotiated/Arbitrated Terms of Agreement for Interconnection, Resale, and Unbundled Elements at 80-81, § 9.1.10). US West claims this provision is not competitively neutral because it is not compensated for costs it incurs in routing long-distance calls. US West challenges the meet-point billing arrangement for distribution of access charges adopted by the FCC pursuant to 47 U.S.C. § 251(e)(2).[7]

Sprint argues that this is an inappropriate forum for US West to challenge the FCC regulations. Sprint claims that US West's proposal does not meet the FCC's standards, which, in fact, require that the CLEC should receive the carrier common line and local switching charges and that transport charges should be shared between the incumbent LEC and the CLEC. Sprint

[7]In its initial brief, US West argued that the division violates the FCC's meet-point billing arrangement for distribution of access charges. US West asserted that its own proposal met the FCC's standard because it allocated transport and switching charges to US West to cover its costs, and offered Sprint the carrier common line charges. However, in its reply brief, US West indicated that it is actually challenging the FCC's Order as being inconsistent with the Act.

counters that US West's claim that it will not recover all of its alleged costs in the interim number portability context is inapposite because the FCC has determined that the "competitive neutrality" mandate in the Act does not guarantee complete cost recovery for local exchange carriers. See Telephone Number Portability, CC Docket No. 95-116, 1998 FCC LEXIS 2252, at *78-*79 (¶ 59) (FCC May 12, 1998). In addition, Sprint alleges that the instances in which US West will not recover costs for backhauling and tandem-switching will only occur in limited circumstances.

The MPUC argues that it followed ¶ 140 of the FCC's July 2, 1996 Number Portability Order which provides that "carriers are to share in the access revenues received for a ported call" based upon meetpoint billing arrangements. The MPUC claims the compensation mechanism for US West that allocates access charges is in conformance with the FCC methodology.

As was stated above, the Act directs that all local exchange carriers have "a duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by" the FCC. 47 U.S.C. § 251(b)(2). Number portability is defined by the Act as "the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another." 47 U.S.C. § 153(30). On July 2, 1996, the FCC released an order directing LECs to provide, upon request of another carrier, currently available number portability measures, such as RCF and DID, until such time as long-term number portability measures are available. In the Matter of Telephone Number Portability, 11 F.C.C.R. 8352 (¶ 6, ¶ 110) (July 2, 1996). The FCC established principles to "ensure that the costs of currently available measures are borne by all telecommunications carriers on a competitively neutral basis . . . ." Id. ¶ 6. The FCC interprets the phrase, "competitively neutral basis," to mean that "the cost of number portability borne by each carrier does not affect significantly any carrier's ability to compete with other carriers for customers in the marketplace." Id. ¶ 131. The FCC determined that a "competitively neutral" cost-recovery mechanism should include the following two criteria: (1) it should not give one service provider an appreciable cost advantage over another provider, when competing for a subscriber, and (2) "it should not have a disparate effect on the ability of competing service providers to earn normal returns on their investment." Id. ¶¶ 132, 135. The FCC also determined that the meet-point billing arrangements is the proper access billing arrangement for interim number portability between neighboring incumbent LECs, and that neither the competing local service provider nor incumbent LEC should retain all terminating access charges. Id. ¶ 140. It directed "forwarding carriers and terminating carriers to assess on [interexchange carriers] charges for terminating access through meet-point billing arrangements. The overarching principle is that the carriers are to share in the access revenues received for a ported call." Id.

Central to the resolution of this issue before the Court are: (1) the meaning of meet-point billing, and (2) a determination of whether the MPUC's decision is in accord with that meaning. The United States District Court of Oregon, when faced with the dilemma of trying to define the term "meet-point billing," noted that the FCC's order provides a novice to the field only a limited understanding of the term. US West Communications, Inc. v. AT&T Communications of the Pacific Northwest, Inc., 31 F.Supp.2d. 839, 848 (D.Oregon 1998). The FCC's order does give some rudimentary parameters to the term, e.g. neither the incumbent LEC nor CLEC should retain all terminating access charges.

The record before this Court provides some further delineation to the term. Beth Ann Halvorson, US West's witness, indicated that under meet-point billing US West would have to share local transport, local switching, interconnection, and carrier common line charges with Sprint. (A16; Direct Testimony of Beth Ann Halvorson at 182). US West has defined meet-point billing as:

> On calls interchange carriers deliver to [US West] to numbers that are "ported" to a CLEC such as Sprint, . . . the FCC has ruled that the CLEC should receive the CCL [carrier common line] and local switching charges and that transport charges should be shared between the incumbent LEC and the CLEC. FCC 96-285, Para. 140.

(A27; Initial Brief of US West to the MPUC at 29-30). This definition of meet-point billing is consistent with the position ultimately adopted by the MPUC.

The Court concludes that the MPUC's decision regarding interim number portability access charges meets the FCC's requirement of meet-point billing. This Court is bound by the FCC regulations and because the MPUC's decision complies with the FCC regulations, the Court must uphold it regarding this matter. See AT&T Communications of California v. Pacific Bell, 1998 WL 246652, at *2 (N.D.Cal. May 11, 1998) (citing Anderson Bros. Ford. v. Valencia, 452 U.S. 205, 219-20 (1981)). US West must bring any challenge to the FCC's rulings before a federal court of appeals. See 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a).

V. BUNDLING REQUIREMENTS

US West claims that the Agreement unlawfully requires it to combine network elements for Sprint. Section 251(c)(3) of the Act states that incumbent LECs have a duty:

> to provide . . . nondiscriminatory access to network elements on an unbundled basis . . . . An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

47 U.S.C. § 251(c)(3). The FCC promulgated rules under this section of the Act requiring incumbent LECs not to separate and, upon request, to combine network elements for new entrants. 47 C.F.R. § 51.315. In Iowa Utilities Board, the Eighth Circuit vacated FCC Rule 51.315(b)-(f), finding that § 251(c)(3) "unambiguously indicates that requesting carriers will combine the unbundled elements themselves" and that it could not "be read to levy a duty on the incumbent LECs to do the actual combining of elements." Iowa Utils. Bd., 120 F.3d at 813. Before the Eighth Circuit decided Iowa Utilities Board, the MPUC issued its Order Resolving Arbitration Issues in this case involving the combining of elements. The MPUC adopted Sprint's proposed contract language concerning the issue of bundling. (A38; Order Resolving Arbitration Issues at 21). Addressing the combining of network elements, the final Agreement between the parties reads as follows:

> US WEST agrees to perform and Sprint agrees to pay for the TELRIC costs of the functions necessary to combine requested elements in any technically feasible manner either with other elements from US WEST's network, or with elements possessed or arranged for by Sprint. However, US WEST need not combine network elements in any manner requested if not technically feasible, but must combine elements ordinarily combined in its network in the manner they are typically combined.

(A45; US West-Sprint Negotiated/Arbitrated Agreement at § 32.1.2)

Although at the time this case was filed in district court a remand of the issue to the MPUC in light of the Eighth Circuit's decision would have been appropriate, the Supreme Court has since reversed the Eighth Circuit and reinstated FCC Rule 315(b). The Supreme Court found that the FCC reasonably interpreted § 251(c)(3) as not requiring the incumbent LECs to provide network elements in discrete pieces. AT&T Corp., 119 S.Ct. at 737. The Court found that "§ 251(c)(3) is ambiguous on whether leased network elements may or must be separated," id., and that Rule 315(b), which states that "[e]xcept upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines," provides a rational interpretation of the provision. AT&T Corp., 119 S.Ct. at 737.

Although the Supreme Court expressly reinstated § 315(b), it did not directly do so with respect to § 315(c)-(f). The Supreme Court's ruling could mean that the Eighth Circuit's decision to vacate § 315(c)-(f) should be revisited, but absent a clear mandate this Court declines to extend the Supreme Court decision that far. See 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a) (challenges to FCC's rules must be brought before a federal court of appeals). Vacated rule 315 (c) and (d) state that:

> (c) Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements in any manner, even if those elements are not ordinarily combined in the incumbent LEC's network provided that such combination is:
> (1) Technically feasible; and
> (2) Would not impair the ability of other carriers to obtain access to unbundled network elements or to interconnect with the incumbent LEC's network.
>
> (d) Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements with elements possessed by the requesting telecommunications carrier in any technically feasible manner.

47 C.F.R. § 51.315 (c) and (d).

To the extent the Agreement requires US West not to separate requested network elements, it does not contravene the Act. However, the final Agreement could be interpreted more broadly. The phrase "US WEST need not combine network elements in any manner requested if not technically feasible" could mean that US West must combine elements that it does not ordinarily combine if it is technically feasible to do so. Because § 315(c) and (d) remain vacated, to the extent the Agreement could be interpreted as requiring US West to combine network elements that it does not ordinarily combine, it violates the Act. This matter is remanded to the MPUC.[8]

VI. MPUC IMPOSED REQUIREMENTS

US West claims the MPUC erred when it imposed three additional terms on the parties that were neither negotiated nor arbitrated: (1) a requirement that the parties identify the MPUC as a third-party beneficiary of the Agreement; (2) a requirement that the parties notify the MPUC of any lawsuit involving the Agreement as well as prohibiting the parties from objecting to a motion by the MPUC to intervene in any such lawsuit; and (3) a requirement that all modifications or amendments of the Agreement be submitted to the MPUC for approval. Specifically citing 47 U.S.C. §§ 252(b)(4) and (c), US West argues that the Act delegates limited authority to the state commission and that the MPUC exceeded this limitation when it imposed the above requirements. US West also claims there is no basis in state law for the provisions that the MPUC unilaterally imposed.

The MPUC responds that the added terms did not change the nature of the Agreement and that the Act's charge, that it act to ensure the public interest, serves as authority for these provisions. The MPUC specifically cites to § 252(e)(3) ("Nothing in this section shall prohibit state commission from establishing or enforcing other requirements of state law in its review of an agreement") and § 252(c) (indicating that a state commission can impose conditions) as

[8] As was noted by the Eastern District of North Carolina, the Act does not explain what should occur if a district court finds that an Interconnection Agreement violates the Act. AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc., 7 F.Supp.2d 661, 668 (E.D.N.C. 1998). Given the appellate nature of the proceeding, a remand to the state commission appears to be the most appropriate option. Id.

alternative bases for its authority.[9]

Section 252(c) ("Standards for arbitration"), one of the two sections of the Act that the MPUC cites as the basis for its authority, states that:

> In resolving by arbitration *under subsection (b)* of this section any open issues and *imposing conditions* upon the parties to the agreement, a State commission shall-
>
> (1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;
>
> (2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and
>
> (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

47 U.S.C. § 252(c) (emphasis added). Standing alone, this section does not conclusively grant the MPUC the authority to unilaterally impose any new condition onto the parties' agreement. When read in conjunction with 47 U.S.C. § 252(b) ("Agreements arrived at through compulsory arbitration"), there is an implication that any condition that the MPUC decides to impose on the agreement must relate to an "open issue," an issue raised by the parties themselves. Section 252(b)(4)(A) states that "[t]he State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any . . . ." This implication that the MPUC cannot impose a condition concerning an issue not raised by the parties is further reinforced by subsection (b)(4)(C) which states that "[t]he State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement . . . ." Given the broader context of § 252(b) and (c) when read

[9] Sprint takes no position on this issue.

together, § 252(c) cannot be construed as a general grant of authority to state commissions to impose any requirement of their choosing.

Although § 252(b) and (c) limit a state commission's power to impose conditions in arbitration proceedings, § 252(e) does give state commissions a broad authority to act when approving any type of Agreement, negotiated or arbitrated. Section 252(e)(3) states that "[n]otwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement . . . ." 47 U.S.C. § 252(e)(3). The Court, therefore, will consider the MPUC's authority to act under state law.

Under state law, the MPUC has only the "powers expressly delegated by the legislature and those fairly implied by and incident to those expressly delegated." In the Matter of Northwestern Bell Telephone Co., 371 N.W.2d 563, 565 (Minn.Ct.App. 1985) (citing Great Northern Railway Co. v. Public Service Comm'n, 169 N.W.2d 732, 735 (Minn. 1969)). Implied powers must be fairly evident from the express powers. Id. (quoting Peoples Natural gas Co. v. Minnesota Public Utilities Comm'n, 369 N.W.2d 530 (Minn. 1985)). The MPUC cites to several sections of the Minnesota statutes, specifically Minn. Stat. §§ 237.06, 237.11, 237.081, 237.16, as providing it with the authority to protect the public interest. Each of these statutory sections deal with specific and limited powers, such as the powers to investigate inadequate services and ensure fair rates, but none explicitly state that the MPUC has the general authority to protect the public interest. Because the MPUC is an agency of limited authority, a grant of general power to protect the public interest may not be inferred. To do so would give the agency unlimited power to act, free from any specific statutory constraint.

Although a general authority to protect the public interest cannot be inferred from the statutes, sufficient authority for the MPUC to require the addition of the three specific terms here at issue can be fairly inferred from the state commission's explicit powers. The added terms are necessary for the MPUC to carry out its other, expressly delineated functions. For example, the MPUC cannot ensure that rates are fair, Minn. Stat. § 237.06, or "ensure the high quality of telephone service throughout the state," Minn. Stat. § 237.16, subd. 8, without the added requirement that all future modifications or amendments of the Agreement be submitted to the MPUC for its approval, the requirement of the third added term in dispute. Similarly, in order to satisfy the statutory obligation, the MPUC needs to be involved in any court case affecting the Agreement, an involvement which the other two added provisions ensure. A presence in court proceedings enables the MPUC to voice the concerns of the public in relation to any potential modification of the Agreement stemming from the litigation and thereby ensure the "high quality of telephone service throughout the state." The MPUC imposed terms are necessary for the MPUC to fulfill the functions expressly delegated to it by the Minnesota legislature and the authority to impose the terms can be inferred from the agency's express statutory powers. Because the MPUC was assuring compliance with requirements of state law, it had the authority under § 252(e)(3) to impose the terms at issue.

VII. TAKINGS CLAIM

US West claims that if the Sprint agreement is upheld, it will result in a taking of US West's property. Specifically, US West claims that: (1) it will be deprived of substantial revenues if Sprint is allowed to engage in sham unbundling, thereby unlawfully avoiding the resale pricing scheme set forth in the Act; (2) it will further incur unreimbursed costs in implementing and meeting the superior service standards the MPUC ordered it to negotiate with Sprint; (3) it will incur substantial costs in adapting its business services for resale to residential customers; and (4) it will incur costs in remote call forwarding Sprint calls that are subject to interim number portability, but has been denied the millions of dollars of access charge revenues for performing the necessary transport and switching work. US West also alleges that making its physical network available for use by its competitors is a physical occupation of its property and therefore a "*per se* taking under the Fifth Amendment."

In relation to its takings claim, US West states that it is not seeking compensation for the alleged taking but rather that it wishes an injunction to prevent a taking without just compensation. US West appears to be alleging a violation of the jurisdictional grant of the Act. In making its argument, US West relies on Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441 (D.C.Cir. 1994). In Bell Atlantic, the D.C. Circuit determined that 47 U.S.C. § 201 did not vest the FCC with the necessary authority to order LECs to provide physical collocation of equipment upon demand. Id. at 1444-47. It found that because the particular statute did not expressly authorize an order of physical collocation, the FCC could not impose it. Id. at 1447. Bell Atlantic is, however, inapposite to the present case, because, unlike the general Communications statute at issue in Bell Atlantic, 47 U.S.C. § 251(c)(6) expressly provides for limitations being placed on the LECs' property rights, including the requirement that incumbent LECs have a duty to provide for the physical collocation of equipment. See 47 U.S.C. § 251(c)(6). In fact, Congress was aware of the Bell Atlantic decision when it authorized the imposition of physical collocation:

Paragraph 4(B) [of section 251] mandates actual collocation, or physical collocation, of

> equipment necessary for interconnection at the premises of a LEC, except that virtual collocation is permitted where the LEC demonstrates that actual collocation is not practical for technical reasons or because of space limitations. . . . Finally, this provision is necessary to promote local competition, because a recent Court decision indicates that the Commission lacks the authority under the Communications Act to order physical collocation. (See Bell Atlantic Tel. Co. v. Federal Communications Commission, 24 F.3d 1441 (1994)).

House Rep. No. 104-204, at 73 (1995). Therefore, Congress clearly intended to vest the agencies with authority to place limitations on the LECs' property rights.

US West has not only challenged the MPUC's authority to impose these limitations on US West's property, but also claimed that the Agreement approved by the MPUC does not fully compensate US West for the taking of its property. This is a traditional takings claim allegation and the Court will therefore apply a traditional takings claim analysis.

The defendants argue that US West's taking claim must fail because: (1) it exceeds the scope of this Court's jurisdiction, which is limited by 47 U.S.C. § 252(e)(6); (2) the claim is not ripe for review; and (3) the agreement contains provisions which allow for full cost recovery by US West.

The Eighth Circuit explicitly noted that a takings claim can be presented to a federal district court under the review provisions of subsection 252(e)(6). Iowa Utils. Bd., 120 F.3d at 818. Therefore, this Court has jurisdiction to hear the takings claim.

In order for a takings claim to be ripe, two elements must be met: (1) the administrative agency has reached a final, definitive position as to how it will apply the regulation at issue, and (2) the plaintiff has attempted to obtain just compensation through the procedures provided by the State. Williamson Co. Regional Planning v. Hamilton Bank, 473 U.S. 172, 191, 194 (1985). Here, neither of these elements have been satisfied.

The Fifth Amendment states that, "private property [shall not] be taken for public use without just compensation." The Takings Clause is not meant to limit the government's ability to interfere with an individual's property rights, but rather to ensure compensation when a legitimate interference that amounts to a taking occurs. Glosemeyer v. Missouri-Kansas-Texas Railroad, 879 F.2d 316, 324 (8th Cir. 1989) (quoting First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987)). The compensation does not have to precede the taking; a process for obtaining compensation simply has to exist at the time of the taking. Id. (citing Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984)). If US West ultimately receives just compensation then there has been no violation of the Takings Clause.

Public utilities, which have a hybrid public and private status, must be analyzed in a slightly different manner than other entities under the Takings Clause.[10] Duquesne Light Co. v. Barasch, 488 U.S. 299, 307 (1989).

> The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so "unjust" as to be confiscatory. Covington & Lexington Turnpike Road Co. v. Sandford, 164 U.S. 578, 597, 17 S.Ct. 198, 205-206, 41 L.Ed. 560 (1896) (A rate is too low if its is "so unjust as to destroy the value of [the] property for all the purposes for which it was acquired," and in so doing "practically deprive[s] the owner of property without due process of law"); FPC v. Natural Gas Pipeline Co., 62 S.Ct. 736, 742, 86 L.Ed. 1037 (1942) ("By long standing usage in the field of rate regulation, the 'lowest reasonable rate' is one which is not confiscatory in the constitutional sense"); FPC v. Texaco Inc., 417 U.S. 380, 391-392, 94 S.Ct. 2315, 2392, 41 L.Ed.2d 141 (1974) ("All that is protected against, in a constitutional sense, is that the rates fixed by the Commission be higher than a confiscatory level").

Id. at 308. If the state fails to provide sufficient compensation, then the state has taken the use of

[10] Although the traditional public utility rate model is not a perfect model for § 252(e)(6) cases, it is informative. See J. Gregory Sidak & Daniel F. Spulber, Deregulatory Takings and Breach of the Regulatory Contract, 71 N.Y.U. Law Rev. 851, 954 (Oct. 1996).

a utility without just compensation and thereby violated the Takings Clause. Id. The particular theory used to determine whether a rate is fair does not matter. Id. at 310 (citing FPC v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944)). If the overall effect cannot be said to be unreasonable then judicial inquiry is at an end. Id. (citing FPC v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944)). Whether a rate is unfair depends on what is a fair rate of return given "the risks under a particular rate-setting system, and on the amount of capital upon which the investors are entitled to earn that return." Id. "Rates which enable [a] company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risk assumed certainly cannot be condemned as invalid . . . ." Hope Natural Gas, 320 U.S. at 605.

The purpose of the Telecommunications Act of 1996 is, in part, to foster competition in the local telephone market. GTE North, Inc. v. McCarty, 978 F.Supp 827, 831 (N.D.Ind. 1997) (citing Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 104-458, at 113 (1996)). Under the Act, US West provides services to its competitors rather than the public. 47 U.S.C. § 251(c). The end goal is not a fair rate of return as in the traditional rate-setting paradigm, but rather the equitable opening up of a market. Neither party to the Agreement is expected to profit in the interconnection or resale processes. See 47 U.S.C. § 251(c)(4)(A) ("to offer for resale at wholesale rates . . ."). Because these transactions are not designed to be profitable, the analysis cannot be fair rate of return as to any individual provision concerning the sale or access of services to the CLECs. Rather the query must be whether any provision or provisions of the Agreement negatively affect the *overall* operation of the incumbent LEC to such a degree that it can no longer receive a fair rate of return from its investment.

In this case, it is premature to ask this question for two reasons. First, the MPUC has not reached a final decision concerning the prices for unbundled elements; they are still subject to a true-up procedure at the end of the Generic Cost Investigation. Until the MPUC reaches a decision on that issue, the overall effect of the Agreement cannot be determined and the takings claim is not ripe for review. Second, the incumbent LEC still has an opportunity to have its public rates increased in light of the MPUC's Orders made pursuant to §§ 251 and 252. If US West is not earning a sufficient return on its investment in Minnesota, it can petition the MPUC for a rate change. See Minn. Stat. § 237.075. The MPUC is obligated to implement a rate base upon which a telephone company can earn a fair rate of return. See id., subd. 6. US West will not have exhausted its state remedies until it has taken this final step. It would only be after such a hearing that a court could determine whether the overall utility rates are "inadequate to compensate current equity holders for the risk associated with their investments under a modified prudent investment scheme." Duquesne Light Co. v. Barosch, 488 U.S. 299, 312 (1989). The MPUC's actions under the Act establish LECs relationships with one another; the equation is not complete until the economic relationship with the public is determined in light of the intercarrier relationships. Because Minnesota offers an opportunity to US West to have its rates readjusted, US West has not yet exhausted its state remedies and its takings claim is ripe for review. US West's takings claim is therefore dismissed without prejudice.

CONCLUSION

Based upon the foregoing, and all of the files, records and proceedings herein, **IT IS HEREBY ORDERED** that:

1. US West's request that this Court find that the US West-Sprint Agreement violates 47 U.S.C. §§ 251 and 252 is **GRANTED IN PART, DENIED IN PART,** and **DENIED WITHOUT PREJUDICE IN PART**. It is granted with respect to Count III (bundling requirement claim), in so far as the Agreement requires US West to combine elements that it does not ordinarily combine. It is denied without prejudice with respect to Count VI (takings claim). It is denied in all other respects.

Ann D. Montgomery
UNITED STATES DISTRICT JUDGE

Dated: March 30, 1999